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No. 09-224

Supreme Court, U.S.
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In The
Supreme Court of the United States

STANLEY R. NICKELS,
Petitioner,

v.

GRAND TRUNK WESTERN RAILROAD, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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REPLY TO BRIEF IN OPPOSITION

Petitioner, STANLEY R. NICKELS, respectfully submits the following Reply to Respondent's Brief in Opposition to Nickels' Petition for Certiorari.

I. There Is A Conflict Among The Lower Courts Concerning The Questions Presented.

Subsequent to the filing of this Petition of Certiorari, the Northern District of Indiana was faced with the identical issue which is before this Court of whether or not a plaintiff's ballast claim brought under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §51-60 was precluded under 49 U.S.C. §20106 formerly part of the Federal Railroad Safety Act of 1970 ("FRSA").[1] Grogg v. CSX Transportation, Inc., No. 1:07-cv-222, 2009 U.S. Dist. LEXIS 83638 (N.D. Ind. September 14, 2009). In denying a motion for summary judgment and ruling that the FRSA did not preclude plaintiff's ballast claim under the FELA, the district court at page 16 of its decision acknowledged that in light of the ruling of the court below in the instant case, a different result would have been reached if the Grogg case had been brought in the Sixth Circuit instead of the Seventh Circuit. In footnote 6 at page 17 of its decision the district court made the following comment:

> While this court certainly respects the Sixth Circuit's decision in Nickels, the fact that

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[1] The FRSA was codified in P.L. 103-272, July 5, 1994, 108 Stat. 866.

> another federal court has held differently on this issue since this court issued its opinion in Wilcox only serves to demonstrate the unsettled, complex, and even confusing state of the law with regard to preclusion issues in FELA cases. (citing Wilcox v. CSX Transp., Inc., Case No. 1:05-CV-107, 2008 U.S. Dist. LEXIS 9387.)

Judge William Lee's statement in the Grogg directly shows why this Court should clarify this FRSA preclusion issue as it pertains to FELA cases. As Judge Lee observed, the state of the law is unsettled and confusing. This case permits the Court to decide the proper interaction between the FRSA and the FELA. Since the passage of the FRSA in 1970, the Court has never reviewed a case which examines the interaction between the FRSA and the FELA. As Grogg so clearly illustrates, a worker residing in the legal jurisdiction of the Seventh Circuit is afforded FELA protection from unsafe walking conditions as all employees had been nationwide for decades. However, because of the decision below, an identically situated railroad worker residing within legal jurisdiction of the Sixth Circuit is denied any potential FELA remedy.

II. Respondent's Brief Never Addresses Petitioner's Argument That The Court Below Erroneously Applied The State Law Preemption Provisions Of 49 U.S.C. §20106 Of The FRSA To Preclude Petitioner's Federal Claim Pursuant To The FELA.

As Petitioner asserted in his opening brief, nothing in the plain or implied language of 49 U.S.C. §20106 suggests that it was the intent of Congress with the

passage of the FRSA to impede or preclude the rights of railroad workers to seek compensation for on the job injuries under the FELA.[2] Despite reviewing the interaction of two federal statutes, the court below improperly applied the state preemption standard contained in 49 U.S.C. §20106 to affirm the dismissal of Petitioner's federal claim pursuant to the FELA. Significantly, in its brief in opposition, Respondent never addresses this issue. Instead of challenging Petitioners's assertion that the court below improperly used the state preemption standards in 49 U.S.C. §20106 to preclude Petitioner's claim, Respondent at pages 16 through 18 of its brief merely points out that other courts in recent years have also improperly applied the state preemption standard contained in 49 U.S.C. §20106 to preclude FELA negligence claims.[3] Respondent fails to recognize that the state preemption provisions of 49 U.S.C. §20106 have no bearing on whether one federal statute, the FRSA, precludes the rights provided under another federal statute, the FELA.

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[2] The court below and other lower courts have confused the concepts of federal preclusion and state preemption; using the rationale of cases where a federal statute take precedence over a state law or regulation and misapplying this preemption concept to the issue of preclusion and whether one federal statute can preclude another.

[3] One of the cases relied upon by Respondent clearly illustrates the confusion which Judge Miller noted concerning this issue, Waymire v. Norfolk and Western Railway Co., 218 F.3d 773 (7th Cir. 2000). First, the Seventh Circuit follows the rationale of state law FRSA preemption cases and holds it must strike the same result in FELA cases for the sake of national uniformity. The Seventh Circuit then goes on to limit the issue of preclusion to the extent the FELA is "inconsistent" with the FRSA. 218 F.3d at 777.

This case provides the Court with the opportunity to reaffirm its holding in Urie v. Thomson, 337 U.S. 163 (1946) that federal railroad safety statutes serve to supplement the FELA. Therefore, it follows that the FRSA should be read together with the FELA to achieve the goals of railroad safety along with the remedial objective of the FELA to compensate injured railroad workers. Unfortunately in recent years, a few courts, like the court below, have relied upon a concern for "national uniformity" expressed in the state preemption standard contained in 49 U.S.C. §20106 to preclude negligence claims brought in FELA cases.[4] This flawed legal analysis has allowed the Respondent to use a non specific track regulation as a guise to immunize itself from liability in a traditional FELA walking condition negligence claim.

The Court in Sprietsma v. Mercury Marine, 537 U.S. 51(2002) rejected the concept of placing national uniformity above safety issues when it came to the matter of boating safety.[5] Consistent with the holding in Sprietsma, this case provides the Court with an opportunity to review the interaction of two safety

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[4] Congress in P.L. 110-432, Sec. 101 made it very clear that safety is the highest priority, not uniformity. See 49 U.S.C. 103(c). Also, Congress in Section 1528 of P.L. 110-53, enacted 8/3/07, amended the preemption title of Section 20106 from "National Uniformity of Regulation" to "Preemption," further indicating that uniformity is not the standard to follow.

[5] Congress in P.L. 110-432, Sec. 101, made it very clear that safety is the highest priority not uniformity. See 49 U.S.C. 103(c). Also, Congress in Sec. 1528 of P.L. 110-53, enacted August 3, 2007, amended the preemption title of 49 U.S.C. §20106 from "National Uniformity of Regulation" to "Pre-emption," as further indication that uniformity is not the standard to follow.

laws, the FRSA and the FELA. Specifically, it allows the Court to clarify that these safety laws should be used in pari materia to enhance railroad safety not to limit it. This is particularly true in this case where Petitioner's negligence theory promotes railroad safety and is completely compatible with the FRSA's purposes.

Despite Respondent's reluctance to address this issue, it is of first impression and of obvious and special importance to rail workers, their families and their employers – the nation's rail carriers. As Judge Lee most recently observed in Grogg, this is an issue which needs clarification and the Court's review of the interaction between the FRSA and the FELA will have significant impact on the many FELA cases pending in the courts across this country. Grogg v. CSX Transportation, Inc., No. 1:07-cv-222, 2009 U.S. Dist. LEXIS 83638 (N.D. Ind. September 14, 2009).

III. Respondent's Argument Ignores The Petitioner's Testimony Which Clearly Demonstrated That Petitioner Made A Walkway Claim Which Was Not Precluded By 49 C.F.R. §213.103

Respondent in an attempt to distinguish this case from Norfolk Southern Railway Co. v. Box, 556 F. 3d 571 (7th Cir. 2009) has contended that Petitioner's ballast claim was limited to the ballast that is used to support track structure. Similar to the court below, Respondent completely ignores the testimony of the Petitioner concerning the unsafe walking conditions which existed along the industrial switching tracks in Lansing, Michigan. During his deposition Petitioner identified nine specific tracks where ballast conditions

created unsafe and unlevel walking conditions. (App. 3a-5a). Petitioner testified that the area he was required to walk adjacent to the track, the ballast should have been leveled and covered with smaller stone, approximately 1/4 inch in size, to provide a more level and smooth walking surface. (App. 5a-7a). Petitioner testified that the walkway stone should have been placed down in an area adjacent to the track approximately two feet adjacent to the extended width of a box car. (App. 7a-8a). Petitioner's testimony was corroborated by other employee affidavits. The walking area adjacent to the railroad tracks, which Petitioner testified needed to be covered with smaller walkway ballast, is the same area adjacent to the railroad track which the Seventh Circuit determined was not covered by 49 C.F.R. §213.103 in Box.

Contrary to Respondent's suggestion, Petitioner's testimony as well as the other affidavits in the record, clearly show that Petitioner's negligence claim concerned the use of large ballast causing uneven and sloped areas in the walkway adjacent to the track where employees were required to walk to perform their work. The Respondent as well as the court below's characterization of Petitioner's claim is limited to areas of track "where stability and support are concerned," is nothing more than an attempt to avoid the holding of Box and the true conflict between its holding and the holding of the decision at issue.

Respondent additionally misinterprets the record below in an attempt to distinguish the Seventh Circuit's holding in Box. At page 22 of its brief Respondent factually distinguishes the evidence presented in Box with the evidence in this case by arguing the court below relied on alleged evidence

regarding drainage problems caused by the use of smaller ballast. However, the court below never referenced the size of ballast and drainage as a factual consideration at any point in its opinion. Thus, the alleged factual distinction between the decision below and Box regarding yard ballast's alleged drainage concerns is non-existent. To this point, Respondent fails to cite the Manual for Railway Engineering published by the American Railway Engineering and Maintenance of Way Association ("AREMA"). (App. 10a-11a). §2.10.4(d) of The Manual for Railway Engineering provides in part:

> Rail yards and some industrial tracks are generally graded from 1 inch to 3/8 inch (AREMA, No. 5 gradation, Table 2.2) to provide improved walkway and safety conditions along the track. The finer gradations for yard applications do not restrict track drainage...

Contrary to Respondent's suggestion, the AREMA railroad track maintenance industry standards recommend the very type of ballast which Petitioner testified should have been placed along the industrial tracks in the Lansing, Michigan area where he worked. Further, the yard ballast does not impact drainage.

Judge Rogers' dissent in the court below noted that this case is no different from one in which a railroad worker brings a FELA claim for being injured by debris when ballast is carelessly unloaded into place. (App. 19a). As Judge Rogers further observed in his dissent, nothing in 49 C.F.R. 213, *et seq.*, contemplates that there can categorically be no negligence with respect to a railroad's construction, maintenance or

use of ballast. Unlike the Respondent and the majority in the court below, Judge Rogers properly reviewed the evidence in this case and found that Petitioner presented a valid FELA negligence claim concerning unsafe walking conditions.

IV. Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

DEFENDANTS' EXHIBIT B

In The Matter Of:

Stanley Nickels v.
Grand Trunk Western Railroad, Inc., et al

Stanley Nickels
November 16, 2006

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* * *

[p.97] A: I believe it's Rite-Aid mostly now.

Q: Was it another place previously?

I take it that's in Owosso.

A: Correct. Shiawassee.

Q: Was there another pharmacy where you would get your prescriptions filled over the years?

A: Over the years?

Q: Yes.

A: Oh, Walgreen's.

Q: Also in Owosso?

A: Correct.

Q: Where else? Anywhere else?

A: Not that I remember.

Q: Let's go over your Complaint itself. I have read your Complaint. I appreciate that you're talking about complaining that the ballast that you worked on in certain places was oversized. Can you tell me where your complaints of oversized ballast were, what locations, or are you telling me that every one of the locations you have described that you ever worked at had bad ballast.

A: Not every one.

Q: So can you, from the many places we have described, tell me where it is you feel the [p.98] ballast was oversized and therefore you're believing that had some role in your foot pain that you have today?

A: Most of Lansing.

Q: When you say most of Lansing --

A: For bad ballast.

Q: And when you say bad ballast, what is it that was bad?

A: Uneven, too large of ballast, sometimes too much ballast and not leveled out.

Q: Is there a particular area in Lansing where this was a condition, a particular set of tracks?

A: It's hard to remember everything because you get used to walking on good ballast, bad ballast. But West Yard Storage I believe is terrible and West Yard Pass, Long Pass, Long Storage.

Q: Let's slow down for just a touch for me.

So in Lansing, the first place within Lansing that you described was West Yard?

A: West Yard Pass.

Q: West Yard Pass. Do those tracks have numbers, some way to reference them?

A: No.

Q: Okay. But those in the industry, when you say West Yard Pass, they will know what you're [p.99] talking about?

A: They'll know.

Q: Okay.

A: They have maps of them.

Q: Fine. Then where else in Lansing?

A: Long Pass.

Q: Long Pass. All right.

A: Long Storage.

Q: Where else?

A: River Track. Pennsylvania Avenue.

Q: Anyplace else?

A: I can't remember what tracks down at the coal dock, what they were called. But you had to walk partly on main line and stuff to check your cars.

Then the main line during the day in Lansing, westbound track, the main line was closed down and used as a yard track.

Q: Say that again now.

A: The double main line going through Lansing there by the dock, double main --

MR. ACKER: Which dock is that? Does that dock have a name?

THE WITNESS: No. The Olds dock.

MR. ACKER: Olds dock. Okay. [p.100] Thanks.

I'm sorry, I didn't mean to interrupt.

MR. LIDDANE: That's all right.

A: 12 track is the Olds.

BY MR. LIDDANE:

Q: So that double main line, the westbound track was shut down you said?

A: Correct, and used as a yard track. Used as switching purposes.

Q: What was it about the ballast there that was troublesome?

A: You had to be on both sides of the -- you would use that for your outbound cars. So when you get ready to leave at night and you're done working, you have to walk all your cars. Well, you have to walk them prior to that, too. You got to take handbrakes off that you're putting on before you move them and so you are walking on main line ballast and there is no reason for it.

Q: Okay.

A: Even though it's a main line during the day, if you are going to switch there during the day then make at least one side of them smooth walking.

Q: Okay.

* * *

[p.113] complaining about as to West Yard, right up on the ties or down at the base of the slope, or where?

A: Sometimes they're slopes. Sometimes there is too much ballast. They just didn't take care of it correct.

Q: Let's focus on the West Yard Pass, the one you're describing. How large was the ballast there? Did you ever measure it?

A: Um, inch and a half.

Q: Was there something about that size that you found objectionable?

A: Oh, yes.

Q: Why? What's wrong with that?

A: If they don't keep it completely level and compacted or do something it's really rough to walk on. It's like large pea stone.

Q: Okay.

A: It's hard to get traction, you know. Then if it's slippery or if it's raining they get slipperier.

Q: So are you saying that it's too small or too large?

A: I'm saying to do it right or what I would say right, you get that leveled out, at least get it [p.114] level, minimum level. If you want to do a good job you get it level and bring in some little bit smaller stone, say, like quarter inch, and fill up the gaps and level it out. You can make it darn near like a cement sidewalk if they do it right. I have seen it right.

Q: And that area that you would like to have seen that kind of change, how close is that to the track itself? Are you talking about a walkway at the base, the toe path, or are you talking about right up near track?

A: I'm talking about where you're supposed to walk legally.

Q: So that's not next to the track then, is it? You are talking about-

A: (Interposing) Yeah, it's next to the track. You have to.

Q: Well, let's talk about what we mean by next to.

In terms of distance from the track itself, how many feet are separating the area you're talking about walking from?

A: You mean like from West Yard Pass to West Yard Storage, how many feet apart are those tracks?

Q: No. That wasn't my question. Let me ask it again.

[p.115] When you're describing a desire to have ballast leveled out more at West Yard Pass and perhaps quarter inch stone put in to level it out, from the tie end of the track, the West Yard Pass track, how far is it to this area where you think this sort of corrective measure should be accomplished, how many feet?

A: Well, a rail car hangs over the rail about a foot and a half and it's nice to have two foot wide to walk on. So from the end of that or from the rail side, I would say three foot. From the boxcar side, two and a half, two foot.

Q: All right.

A: I mean I'd settle for one foot.

Q: And instead what do you contend is there during the time that you were working along that track in terms of space to work and walk?

A: Say that again, please.

Q: Are you saying that there was simply no space to walk where the ballast was smooth and proper size next to that track?

A: Possibly on one side there was a smooth, there was smooth.

Q: Okay.

A: But it doesn't matter, when you work tracks you [p.116] got to work both sides of the track.

Q: Did you ever make a specific complaint regarding working on the main line, that double main west shutdown track, or that West Yard Pass, did you ever make a complaint about the ballast conditions to a supervisor?

A: Oh, I have complained to men I work with, you know. They didn't like it, either.

Q: So you complained to your co-workers.

Did you ever make a specific complaint to a supervisor about those conditions?

A: Um, no more than saying something to like Denny or Dave Mingas.

Q: Who is Denny and who is Dave Mingas?

A: They were people I worked with.

Q: They are co-workers?

A: Right.

Q: They weren't your supervisor?

A: No.

MR. LIDDANE: Off the record.

(A brief discussion was held off the record.)

MR. LIDDANE: Back on the record.

* * *

APPENDIX 2

[PLAINTIFF'S EXHIBIT 4]

Roadway and Ballast

* * *

2.10.4 BALLAST GRADATIONS (1988)

a. The gradation of a ballast material is a prime consideration for the in track performance of ballast materials. The gradation must provide the means to develop the compactive or density requirements for the ballast section and provide necessary void space to allow proper run off of ground water.

b. Ballast gradations should be graded uniformly from the top limit to the lower limit to provide proper density, uniform support, elasticity and to reduce deformation of the ballast section from repeated track loadings.

c. The AREMA mainline ballasts are graded in three sizes from 2½ inches to ¾ inches, 2 inches to 1 inch and 1½ inches to ¾ inch; however, two additional gradations No. 25 and No. 4-A have been added to the specification to meet requirements of the railroads.

d. Railyards and some industrial track gradations are generally graded from 1 inch to ¾ inch,

(AREMA No. 5 gradation, Table 2-2), to provide improved walkway and safety conditions along the track. The finer gradations for yard applications do not restrict track drainage as the construction practices for yard facilities provide quick run off of ground water through the means of under track and yard drainage systems. A consideration in the selection of the proper ballast gradation is the selection of a ballast that will limit the amount of material removed from the track section during undercutting operations. Most undercutting operations remove all of the material below the ¾ inch size. Limiting the amount of the ¾ inch material in the original gradation will reduce the amount of ballast removed when undercutting operations are used to clean and restore the track ballast section. The larger ballast gradations being used on the railroads today do not increase the cost of tamping. Mechanization has eliminated most of the necessity for manual labor in the roadway maintenance practices.

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